their iron ore from mines in northern Minnesota, Wisconsin, and upper Michigan via the Lake Erie ports. This domestic ore has long moved on a rate structure which reflected parity of rates from all Lake Erie ports despite great differences in distance from the ports. Since World War II, however, because of the depletion of U. S. reserves of high grade ore, steel producers have been required to develop many new sources abroad, and iron ore is now being imported through the North Atlantic ports from 13 or more foreign sources.

Before October 9, 1950, the rail rate on iron ore from Baltimore to Youngstown, for example, was $3.10 per gross ton. From Philadelphia, New York, and Boston to Youngstown the rates were $3.32, $3.76, and $8.25, respectively. From the latter three ports, these were "paper rates" under which no traffic moved.

On October 9, 1950, the railroads serving Baltimore made effective reduced rates to 17 ore-consuming points in the Youngstown, Steubenville, and Wheeling areas, the rate to Youngstown becoming $2.71. As the tonnage of imported iron ore continued to increase, the railroads serving the other ports decided to publish rates which would give them a fair opportunity to compete for this new traffic which was supplanting iron ore they were moving to the same points via the Lake Erie ports. After it became apparent that only under a parity of rates would there be any fair opportunity to compete, The Pennsylvania Railroad Company (hereinafter called the "Pennsylvania") published reduced rates to become effective February 9, 1953, from Philadelphia to the 17 points, which rates were the same as those in effect from Baltimore. On the same date, the Erie Railroad Company (herein-

after called the "Erie") published an equalizing $2.71 rate from New York to 7 of the 17 points in the Youngstown area which it reaches with its own lines, and The New York Central Railroad Company (hereinafter called the "Central") published the same rate from New York and Boston to 7 points in the Youngstown area (including 5 of the 7 reached by the Erie) which the Central reaches with its own lines. Because the Baltimore carriers and the Pennsylvania refused concurrences, no parity of rates could be established to the points in the Steubenville and Wheeling areas from New York Harbor.

In an attempt to continue the monopoly on this new traffic, The Baltimore and Ohio Railroad Company almost immediately published schedules to become effective February 16, 1953, proposing to reduce its rates to those of the 17 points on its own lines by 20 cents, the proposed rate to Youngstown being $2.51. These reductions were matched by the Pennsylvania from Philadelphia by schedules filed to become effective March 11, 1953.

The operation of the proposed schedules was suspended by the Commission and after extensive hearings, Division 2 of the Commission found the equalizing $2.71 rate from Philadelphia to Youngstown just and reasonable. (291 I.C.C. 527) The Division disapproved the proposed further reductions to $2.51 in the rates from Baltimore and Philadelphia, holding that "no attempt was made to justify the reductions." A majority of Division 2 found the $2.71 rates from New York and Boston not shown to be just and reasonable. The majority stated that the proposed rates from New York and Boston would produce lower revenues than from Philadelphia; that the facilities

at New York and Boston are inadequate for unloading iron ore in substantial lots; and that there was no positive indication that adequate facilities would be constructed at these two ports (pp. 553-54).

After petitions by various parties, the matter was reopened for further hearing by the entire Commission. At the further hearing it was shown that after a parity of rates had been established from Philadelphia early in 1954 pursuant to the Division 2 report, the tonnage of imported iron ore moving from that port to destinations west of Pittsburgh in the first 11 months of 1954 totaled over 600,000 tons compared with none the previous year. At the same time, the shipments from Baltimore to this area were also increasing, going from about 800,000 tons to over a million tons.

The Port of New York Authority showed at the further hearing that there were several suitable locations for a modern ore-unloading facility at New York, but stated that it could not consider building such a facility without a parity of rates. To prove that the rate of $2.71 from New York to Youngstown is just and reasonable, the Erie introduced a complete and detailed study showing its out-of-pocket costs of hauling iron ore. The revenues from the rates exceeded such costs by about 34 percent. The Commission in its report made certain adjustments in these costs and added an amount for return on investment, which reduced the margin to about 15 percent, but even on this basis the rate is clearly compensatory and makes a substantial contribution to revenue needs.

At the further hearing, the Baltimore carriers and the Pennsylvania again made no attempt to justify

the proposed $2.51 rates, and in fact urged that the Commission disapprove such rates.

In its report (299 I.C.C. 195), the Commission found the parity of rates from Philadelphia to the Wheeling, Steubenville and Youngstown areas and the $2.71 equalizing rate from New York to the Youngstown area to be just and reasonable. The $2.71 rate from Boston was found to be noncompensatory and was disapproved. The $2.51 rates from Baltimore and Philadelphia to the Youngstown area were again found not shown to be just and reasonable and ordered canceled.

In a suit brought by the Baltimore railroads and supporting interests, the district court vacated the Commission's orders insofar as they approved the $2.71 rates from New York. The application of the rates from New York was permanently enjoined by the court.

With respect to the $2.71 rates from Philadelphia, the district court ordered the case remanded to the Commission "to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." Pending such findings, the court ordered that parity between Philadelphia and Baltimore could be retained on the $2.71 basis, "upon the assumption that steps be taken to secure a prompt determination."

The district court affirmed the Commission's orders insofar as they disapproved further reductions to $2.51 in the rates from Baltimore and Philadelphia to Youngstown and, since no appeal was taken from that finding, those rates are not in issue here.

THE QUESTIONS ARE SUBSTANTIAL

1 and 2. The district court erred in setting aside the Commission's order approving carrier-initiated New York rates which were shown to be compensatory, competitively necessary, not otherwise unlawful, and in accord with the National Transportation Policy.

Section 15(7) of the Interstate Commerce Act provides that at any hearing involving a proposed change in a rate schedule which has been suspended for investigation by the Commission, "the burden of proof shall be upon the carrier to show that the proposed changed rate * * * is just and reasonable." In numerous proceedings involving reduced rates proposed by railroads to meet competition, the Commission has ruled that the statutory burden has been met if (1) the rates are shown to be compensatory, either by comparison with other lawful rates or through a cost study, (2) the rates are shown to be no lower than necessary to meet the competition, and (3) it does not appear that the rates are otherwise unlawful. Whenever it appears that the National Transportation Policy of developing, coordinating, and preserving an adequate national transportation system by water, highway and rail would be affected, the Commission must of course administer and enforce section 15(7), as well as the other sections of the act, with a view to carrying out that policy.

In the present case, the Commission approved the rates from New York as just and reasonable after it found that the usual criteria had been met. The Commission found that the New York rate "would exceed the costs from New York by 38.8 cents per gross ton," (299 I.C.C. 208) and that "the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia, and this appears to be a reasonable assumption with rate parity also at New York." (299 I.C.C. 209)

So far as the lawfulness otherwise of the New York rate is concerned, the Commission found (299 I.C.C. 208):

> "It has long been recognized that carriers may, *within lawful bounds,* so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. That appears to be what the respondents here have attempted to do." (Emphasis added)

In its report, the Commission specifically referred to its duty to consider the National Transportation Policy and in connection therewith found that iron ore is a commodity which is "of vital importance to the national defense" and that "it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports." (299 I.C.C. 209)

The district court's reasons for reversing the Commission's findings as to the New York rate are far from clear. Although the Commission's report left no doubt that it had approved the New York rate after finding that it met *all* of the pertinent tests, the court in various parts of its opinion states that the

Commission approved the rate *only* because it was compensatory or *only* because it was competitively necessary or *principally* because it would further the National Transportation Policy. At page 278 of its opinion, the court states:

> "* * * the approval of parity between New York and the more southerly ports, notwithstanding considerable differences in distances, strengthens the impression that the Commission holds the view that the conventional factors of rate making must yield to considerations of the general welfare. Aside from these considerations the New York decision rests on certain cost data showing that on the Baltimore level a rate from New York would exceed the costs by 38.8 cents per ton. *For this reason alone* the rate was found to be just and reasonable;" (Emphasis added)

On the same page, the court says:

> "* * * the *only* justification in the record for the proposed rates from New York 'is bottomed solely on the desire to meet the competition of Philadelphia and Baltimore.'" (Emphasis added)

And in an earlier part of its opinion, the court states (p. 276):

> "It is obvious that *the principal basis* for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system." (Emphasis added)

If the New York rate was approved "for the reason alone" that it was compensatory, then the fact that it

was competitively necessary could not have been "the only justification." On the other hand, if either of these was the "only" reason for the Commission's approval, then the "principal basis" could not have been that the rates would be in furtherance of the National Transportation Policy. Obviously, all three reasons formed the basis for the Commission's approval and properly so.

Actually, the district court does not seem to find fault with the Commission's findings that the equalized New York rates are compensatory, competitively necessary, and in accord with the National Transportation Policy, but seems to hold that such rates are unlawful for other reasons.

To the extent that such reasons may be inferred, they seem to be three: (a) distance alone is the controlling factor in determining the lawfulness of rates; (b) the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship; and (c) the Commission's action was a prescription of rates for the purpose of diverting traffic from one locality to another. These reasons are discussed immediately below.

3. The district court erred in setting aside the Commission's order on the theory that distance alone is the controlling factor in determining the lawfulness of rates on import traffic.

In its opinion, the district court states (p. 274):

> "In upholding parity of rates for Baltimore, Philadelphia and New York the Commission has disregarded the disparity of distances and thus in effect has approved a lower rate from Philadelphia and New York than the rate from Baltimore."

The court itself points out that parity of rates for different distances "is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems." (p. 274) The court seems to hold, however, that a showing that equalized rates are compensatory, competitively necessary, and in accord with the National Transportation Policy is insufficient to justify a parity of rates for different distances.

In rate adjustments involving ports or gateways, the variations in rail distance have usually been virtually ignored. The rule that distance alone cannot govern is one of long standing. As early as 1915, the Supreme Court in *Louisville & N. R. Co.* v. *United States*, 238 U.S. 1, stated (at p. 12):

> "Water competition, rail competition, and competition of markets, enters so largely into the establishment of rates that mere distance is not necessarily a determining factor; indeed, the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road."

In its opinion, the district court states that the differential in favor of Baltimore "originated in the natural advantages derived from the shorter distance of the port to destinations in the West and for this reason has been recognized for many years as a dominant factor in the rate relationships between the competing ports." (p. 274) This basic misconception is probably the main reason for the court's erroneous decision. Actually, the court itself correctly states in an earlier part of its decision that the differentials were

established "so as to equalize the aggregate cost of transportation between competing points in the West and the domestic and foreign ports reached through those cities." (p. 260)

As pointed out by the Commission in *Export Grain From Buffalo to New York,* 292 I.C.C. 647, 651, the theory that each port should have the inland rate to which its geographical location might seem to entitle it has long since been rejected, since foreign traffic does not stop at the seaboard.* In port or gateway rate adjustments, distance obviously cannot be controlling and the Commission properly found in this case that there was ample justification for disregard of differences in distances by the carriers.

4. The district court erred in setting aside the Commission's order on the theory that the freedom of rail carriers to initiate competitive rates must yield to a long-established differential rate relationship under which traffic never actually moved through the competing ports.

In its opinion, the district court describes the case as follows (pp. 273-4):

> "The specific question which the Commission decided was whether the prospective increase in the importation of iron ore, especially ore from Labrador, requires or justifies the striking down of the long-established differential in favor of Baltimore in order to enable Philadelphia and

* Paradoxically, the Baltimore interests which are here contending that they should have lower rates reflecting their shorter distance to Youngstown argued in the *Grain* case that they should have a differential *under* Albany, among others, even though the short-line distance from Buffalo to Baltimore was about a third longer than to Albany.

> New York to have a share of the traffic and thereby insure their maintenance as ports of entry for the product."

Under the differential-rate adjustment, as the district court points out, the rates from Baltimore are 20 cents a ton under Philadelphia and 60 cents a ton under New York and Boston. The Commission in its report (299 I.C.C. 197) stated that the present rates from Baltimore, Philadelphia, New York, and Boston to Youngstown are $2.71, $2.71, $3.76 and $8.25, respectively. Some years ago, the rates from Philadelphia and New York were 20 and 60 cents higher than from Baltimore, but since they were "paper" rates under which no traffic moved, their level was largely immaterial. The rate on iron ore from Boston has never been related to the Baltimore rate, while on traffic subject to the differential-rate adjustment it is always 60 cents higher. In spite of these facts, the district court erroneously assumes that iron ore traffic had always moved subject to the differential-rate adjustment and reverses the Commission for its "striking down of the long-established differential."

It seems clear that even if iron ore traffic had been included in the differential-rate adjustment, there was ample justification for the Commission's approval of the carrier-proposed equalized rates from New York and Philadelphia. The district court in its opinion cites numerous proceedings in which the Commission found the differential adjustment not unlawful. (Footnote, p. 261) In all but the last of the cited proceedings the differential was attacked by commercial or port interests. In the last cited case, *Ex Parte* [*Lake*] *Grain From Buffalo to N. Y.*, 278 I.C.C. 31, the New York carriers themselves proposed to establish rate

parity instead of the differential relationships which had previously been voluntarily maintained. After the Commission disapproved the proposed rate parity, a three-judge district court at Boston reversed the Commission in *New York Central R. Co.* v. *United States,* 99 F. Supp. 394, affd. *Interstate Commerce Commission* v. *New York Central R. Co.,* 342 U.S. 890. The district court in that case explained the difference between attacks on the differential adjustment by commercial interests and a change in the adjustment proposed by the carriers, as was done in the *Grain* case (and in the instant case), as follows (p. 398):

> "In each of these proceedings the Commission held the differential to be not unlawful and refused to change it. It should be noted, however, that in all of these attacks the Commission was asked to declare the existing differential unlawful; for the first time, in the instant proceeding, has the Commission been asked to find that a change in the differential proposed by one of the competing groups of railroads would be unlawful. Heretofore, the Commission has only had to decide whether to permit the carriers to maintain the differential; here the Commission has ordered the carriers to maintain the differential or at least not to reduce it."

The district court's citation in support of its decision of a case which on appeal was decided directly opposite to the court's decision in this case only points up the court's failure to understand the exact nature of the question presented to the Commission and its action with respect thereto. The Commission in this case did not strike down anything; it merely approved carrier-initiated equalized rates from New York and Philadelphia which the proponent carriers had shown to be just and reasonable.

5. The district court erred in failing to distinguish between voluntary rate action by the carriers and the prescription of rates by the Commission.

In the opening paragraph of its opinion, the district court states (p. 260):

> "This suit was brought * * * to set aside decisions and orders of the Interstate Commerce Commission which *prescribed* parity of railroad rates on imported iron ore from the ports of Baltimore, Philadelphia and New York to seventeen* destinations in the eastern portion of the so-called differential or Central Freight Association territory." (Emphasis added)

After misunderstanding the nature of the Commission's action, it was probably inevitable that the district court would reach an erroneous conclusion as to the Commission's decision. In this case, the Commission had been requested to prescribe a parity of rates by the New York and Boston carriers and to prescribe differentially related rates by the Baltimore carriers. It declined to prescribe any rates. Although these appellants believe that the Commission would have been completely justified in prescribing rate parity, that question need not be considered here. The Commission merely approved those rates which had been shown to be just and reasonable and otherwise lawful (the $2.71 rates from Philadelphia and New York) and disapproved those rates which the carriers had not justified (the $2.51 rates from Baltimore and Philadelphia) or which the Commission had found would be noncompensatory (the $2.71 rate from Boston).

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* Actually the Erie and Central rates each apply to only seven destinations.

In *New York Central R. Co.* v. *United States, supra,* the district court pointed out (p. 399):

> "The Commission itself has previously recognized, even in cases involving the ex-lake grain differential, that carriers may lawfully make voluntary rate adjustments which the Commission could not require them to make. *Galveston Commercial Association* v. *Abilene & Sou. Ry. Co.,* 109 I.C.C. 114, 121, 125 (1926); *Port of New York Authority* v. *Baltimore & Ohio Railroad Co.,* 248 I.C.C. 165, 180 (1941); *Ex-Lake Grain from Ogdensburg to New England,* 208 I.C.C. 385, 391 (1935). See also *Maritime Association of Boston Chamber of Commerce* v. *Ann Arbor Railroad Co.,* 126 I.C.C. 199, 211 (1927). Of course, under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof before the Commission to show that the proposed rate was 'just and reasonable.' 'Conversely, the proposed schedule must be upheld as lawful unless adequate reasons are presented for finding it contrary to the statute.' *Office Supplies from Gloucester, Mass., to Chicago,* 245 I.C.C. 669, 673 (1941)."

The district court's erroneous conclusion stems largely from this failure to understand the difference between voluntary and compulsory action. So long as the carriers serving Philadelphia and New York insisted upon maintaining differentially higher rates than those from Baltimore, the Commission in numerous proceedings ruled it should not force them to establish parity and ignore the differences in distances. But where, as in the *Grain case* and the instant case, the Philadelphia and New York carriers voluntarily publish equalized rates for different distances, the Commission cannot prevent them from doing so if the equalized rates are shown to be competitively necessary and not bur-

densome to other traffic, and are otherwise not shown to be unlawful. This distinction was clearly set forth in the report of the Commission's Division 2 (291 I.C.C. 552), and the district court erred in failing to recognize it.

6. The district court erred in remanding the case to the Commission to make explicit findings* "as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic therein to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." (p. 278)

Such a remand seems clearly to have been beyond the court's power. By directing the Commission to make specific findings as to the traffic which has moved through the ports since February 19, 1954, the court's remand requires the Commission to reopen the case for further hearing. This, it is submitted, the district court was without authority to do.

None of the parties had petitioned for reopening of the proceeding prior to the action in the district court. If such a petition had been filed, the grant or denial thereof would have been a matter within the discretion of the Commission, and its action with respect thereto could not be reversed except upon the clearest showing

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* Although the court's remand for specific findings applies only to Philadelphia and Baltimore, it is clear that this is so only because the court's decision precludes further consideration of the New York rate altogether. Were the court's decision to be reversed with respect to New York's continuation in the case, the Commission would presumably be directed to make the same specific findings as to New York.

of abuse of discretion. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 534-545; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514-518.

Only once in the history of administrative law has the Supreme Court reversed an administrative agency for refusing to grant a rehearing on the contention that the record was "stale." *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U.S. 248. In that case the record was closed in September 1928 and a petition for rehearing was filed in February 1931, after there had been a tremendous change in the nation's economic conditions. There is nothing even remotely resembling such a situation here. It seems clear that if the Baltimore interests had petitioned for reopening and the Commission had refused, there would have been no grounds on which the district court could have reversed the Commission and ordered reopening. Certainly, the court cannot direct such a reopening on its own motion merely to get the latest volume figures into the record. As the Supreme Court stated in *Interstate Commerce Commission* v. *Jersey City, supra,* at p. 514:

> "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has

been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

Even if the court had the power to remand the case to the Commission for inclusion in the record of further tonnage figures, it seems clear that such a remand would serve no useful purpose. The record is clear that no iron ore to the Youngstown area has moved or could move through Philadelphia or New York under the differential-rate basis.* The court in its opinion seems to say that rates cannot be adjusted because of the volume moving through the ports and that a port is entitled to keep all the traffic it can get. The court states (p. 277):

> "Obviously it is no answer to prophesy that the chances are that Baltimore will not suffer a loss of total tonnage under parity because the volume of imports is expected to greatly increase. The port will still be entitled to the benefits of its geographical position and the expected profits of the new business may not be diverted merely to satisfy the desire of other ports to share therein."

Thus, the court says in effect that, as between Baltimore and New York, the rates must reflect geographical position and the amount of tonnage moving through the ports is immaterial. If that is so, the court cannot consistently remand the case to the Commission to make findings as to the tonnage moving through Baltimore and Philadelphia, with the idea that the relative

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* So far as New York is concerned, the record shows that the construction of an ore-unloading facility which is necessary to permit the movement of iron ore in volume will not even be undertaken without a parity of rates.

volume moving through those two ports will determine the proper rate adjustment.

The Commission found that carriers serving the competing ports would have a fair opportunity to compete for this traffic on the basis of equal rates. In its report, the Commission set forth all the tonnage figures which were submitted prior to the closing of the record and on the basis of such figures made all of the predictions for the future which it could reasonably be expected to make.

The Court's remand for the purpose of specific findings as to the relative costs of ocean shipping is equally erroneous. The evidence before the Commission was clearly insufficient for it to make such findings. The only estimate as to the daily operating cost of a large ore carrier was a "guess" by a Boston witness. The court in one part of its opinion refers to the cost as "$2,000 per day" (p. 265) and in another part as "from $1,000 to $2,000 per day." (p. 277) If the Baltimore carriers wanted to claim that they were under a competitive disadvantage because of the lower ocean costs to competing ports, it was incumbent upon them to submit evidence to show the amount of this disadvantage. This, they did not do. Instead, they based their claim for a rail-rate advantage upon the old differential-rate adjustment which they argued must be applied to this traffic.

Even if, pursuant to the court's directions, the Commission should reopen the proceeding and require some qualified party to submit evidence as to ocean costs, such evidence would be of little use. As pointed out in the Commission's report (299 I.C.C. 198), while Philadelphia and New York have an ocean distance ad-

vantage (although not necessarily an ocean-cost advantage) over Baltimore with respect to some foreign origins, the reverse is true as to other foreign origins. These rates apply not just on Labrador ore, as the court seems to imply, but on all iron ore, whatever its source. Although most of the ore presently coming through Philadelphia and Baltimore to the Youngstown area originates in Labrador, there is nothing to prevent the steel companies from moving the ore from other foreign origins to the Youngstown area.

Even with rate parity, the New York carriers would have a fair opportunity to compete for only a small fraction of the ore coming from Labrador. The M. A. Hanna Company, which controls 27 percent of the total Labrador iron ore production, also controls the company which operates the ore-unloading facility at Philadelphia and it is unrealistic to expect that much of this ore would move through New York. Another 38 percent of the Labrador ore production is controlled by steel companies whose plants are located at points not reached by the New York lines and to which no equalized rates have been published. Some of the plants of the Republic Steel Corporation, which controls 25 percent of the Labrador ore production, are not reached by the New York lines and where this company has "split cargoes" going to several destinations, New York almost certainly would not be used. It is only with respect to the 10 percent of Labrador iron ore controlled by the Youngstown Sheet and Tube Company that the New York carriers would have any real opportunity to compete. If the New York carriers are to get any sizable volume of imported iron ore traffic it will probably have to come not from Labrador but from countries where New York is at an ocean distance disadvantage.

Thus, it is clear that the district court was without authority to remand the case to the Commission and direct that it be reopened for further hearing and additional specific findings. Even if the court had such power, the additional findings requested would be of little or no value and would not justify the remand.

CONCLUSION

The questions presented by this appeal are substantial and they are of considerable public importance. It is respectfully submitted that probable jurisdiction should be noted.

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